NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DELVIN WILLIAMS, JR., an individual, on behalf of himself and on behalf of the Bert Bell-Pete Rozelle NFL Player Retirement Plan and the NFL Player Supplemental Disability Plan,

Plaintiff - Appellee,

v.

RETIREMENT BOARD OF THE BERT BELL-PETE ROZELLE NFL PLAYER RETIREMENT PLAN AND THE NFL PLAYER SUPPLEMENTAL DISABILITY PLAN; WILLIAM V. BIDWELL; THOMAS J. CONDON; EDDIE J. JONES; TAYLOR SMITH; LEONARD TEEUWS; JEFFREY VAN NOTE, individuals, as members of the Retirement Board of the Bert Bell-Pete Rozelle NFL Player Retirement Plan and the NFL Player Supplemental Disability Plan,

Defendants - Appellants.

No. 02-16093

D.C. No. CV-98-21071-RMW

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Ronald M. Whyte, District Judge, Presiding

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Argued and Submitted March 12, 2003
San Francisco, California

Before: KOZINSKI, GRABER, and BERZON, Circuit Judges.

1. We review the Board's decision for abuse of discretion, because the Plan grants discretion to the Board. Jebian v. Hewlett-Packard Co. Employee Benefits Org. Income Prot. Plan, 310 F.3d 1173, 1177 (9th Cir. 2002). The Board's decision must be upheld where, as here, substantial evidence in the record supports it. McKenzie v. Gen. Tel. Co. of Cal., 41 F.3d 1310, 1316-17 (9th Cir. 1994).

First, medical evidence supports the determination. Dr. Holmboe found, in 1983, that Plaintiff was able to engage in "supervisory employment." Dr. Harrington opined in 1984 that Plaintiff was disabled only with respect to "work which involves any significant requirement for lifting, stooping, stretching, bending, prolonged standing or walking." By implication he thus agreed with Dr. Holmboe that Plaintiff could perform supervisory or other sedentary work. In 1997, Dr. Harrington wrote that, as of May 1995, Plaintiff's "findings, symptoms, and disabilities continued unchanged"—i.e., his physical condition had not worsened—since 1984.

Second, Plaintiff's work history supports the Board's determination. Plaintiff earned a salary, listed his profession as "Executive," and worked for three employers, until resigning due to medical problems. Actual employment in sedentary positions demonstrates employability in such positions.

2. It follows that the district court also erred in awarding attorney's fees and costs to Plaintiff.

REVERSED.